REED B. ROBISON
RO LIVESTOCK

v.

BUREAU OF LAND MANAGEMENT

IBLA 91-277, et al. Decided July 26, 1991

Interlocutory appeals from orders of Administrative Law Judge Ramon M. Child denying motions to set aside decisions of Bureau of Land Management Area Managers, Schell and Tonopah Resource Areas, Nevada. NV-04-90-5, et al.

Orders affirmed.

1. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Administrative Review--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Cancellation or Reduction--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Motions

   It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

APPEARANCES: John E. Marvel, Esq., Elko, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This opinion addresses interlocutory appeals from three orders issued by Administrative Law Judge Ramon M. Child, dated April 11 and May 7, 1991, denying motions filed by Reed B. Robison (Robison) (IBLA 91-277) and RO Livestock (IBLA 91-335 and 91-357). The motions sought to set aside

decisions rendered by the Resource Area Managers of the Bureau of Land Management (BLM) Schell and Tonopah Resource Areas, Nevada.

On June 1 and July 16, 1990, the Resource Area Managers issued three final decisions reducing the authorized livestock grazing use on the Chin Creek, San Antone, and Smoky allotments. 1/ The permittees affected by the reduction of authorized livestock grazing use were Robison and RO Livestock.

On August 14, 1990, Robison filed a notice of appeal from the July 16, 1990, decision of the Schell Resource Area Manager. The appeal was not transmitted to the State Director, Nevada, BLM, until November 15, 1990. On November 28, 1990, the appeal was forwarded to the Hearings Division, Office of Hearings and Appeals (OHA), in Salt Lake City, Utah, and was received on November 30, 1990.

Similarly, RO Livestock filed timely notices of appeal from June 1, 1990, decisions of the Tonopah Resource Area Manager on July 16, 1990. These appeals were not transmitted to the State Director until February 13, 1991. On February 26, 1991, the appeals were forwarded to the Hearings Division, and were received on March 1, 1991.

On March 4 and 18, 1991, Robison and RO Livestock (collectively referred to as appellants) filed motions with the Hearings Division to set aside the Resource Area Managers' June and July 1990 decisions for BLM's failure to transmit the record to the Hearings Division in a timely manner, as required by 43 CFR 4.470. BLM filed a formal response to the motions. By orders dated April 11 and May 7, 1991, Judge Child denied appellants' motions. Appellants filed interlocutory appeals to this Board. The appeals are docketed as IBLA 91-277 (Robison), 91-335 (RO Livestock), and 91-337 (RO Livestock).

The applicable regulation, 43 CFR 4.470, sets out the procedure for filing appeals to an Administrative Law Judge from a final BLM grazing decision. Under this regulation, a permittee may initiate an appeal from a final grazing decision by filing an appeal in the office of the deciding official within 30 days after receipt of the decision. See 43 CFR 4.470(a). Upon receipt of the appeal, the deciding official "shall promptly forward the appeal to the State Director" (43 CFR 4.470(d), emphasis added). The State Director may elect to file a motion to dismiss the appeal "[w]ithin 30 days after his receipt of the appeal," in which case the appellant has 20 days from service on him of the motion to file an answer thereto. Id. The regulation then provides that the "appeal, motion, * * * and the [answer] will be transmitted to the Hearings Division, [OHA], Salt Lake City, Utah." Id.

1/ The Schell Resource Area Manager's decision to reduce authorized use on the Chin Creek allotment was issued with full force and effect. The Tonopah Resource Area Manager's decisions to reduce authorized use in the San Antone and Smoky allotments were not given full force and effect pending appeal.

Appellants contend that BLM failed to comply with 43 CFR 4.470 when it failed to forward their appeals to the State Director "within ten days from the receipt * * * of Appellant[s'] appeal[s]" (Statement of Reasons (SOR), IBLA 91-277, at 3). Appellants allege that this failure ultimately resulted in the late receipt of the appeals by the Hearings Division, even though the State Director forwarded the appeals to the Hearings Division within 30 days from the date of receipt of the appeals. Appellants argue that the late receipt of the appeals by the Hearings Division has acted to their prejudice, precluding their ability to exercise their fundamental right of procedural due process, and seek reversal of Judge Child's denial of their motions to set aside the Resource Area Managers' decisions.

[1] At the outset, there is no question that BLM delayed sending the subject appeals to the State Director for a considerable period of time following receipt of appellants' notices of appeal. A 3-month period elapsed before the appeal from the Schell Resource Area Manager's July 1990 decision was forwarded to the State Director and the appeal languished in the Tonopah Resource Area office for a period of about 7 months. Thus, even though the State Director was able to transmit the appeals to the Hearings Division within about 2 weeks, the overall delay was inordinate.

As noted supra, under 43 CFR 4.470(d) the deciding official "shall promptly forward the appeal to the State Director" (emphasis added). The regulations do not define what is meant by "promptly." In support of their contention that it means 10 days from receipt of the notice of appeal, appellants refer to various Hearings Division decisions, viz., Wilcox v. BLM (UT-06-90-2); L. U. Ranching Co. v. BLM (ID 01-88-02); Adobe Hills Ranch v. BLM (NV 01-90-1). 2/ Hearings Division decisions are not published, the Board does not routinely receive copies, and appellants have not submitted copies of the cited decisions. In any case, decisions of subordinate officials of the Department have no precedential value. See Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 395, 95 I.D. 1, 14 (1988); Cheyenne Resources, Inc., 46 IBLA 277, 283-84, 87 I.D. 110, 113-14 (1980). Thus, the cited decisions are not "controlling in this situation" (SOR, IBLA 91-277, at 3).

2/ Appellants note that these decisions by the Hearings Division are based on the Board's ruling in Utah Chapter Sierra Club, 114 IBLA 172, 175 (1990), wherein we held that it is "essential to the proper functioning of the Department's administrative review process" that BLM, as well as other agencies whose decisions are subject to appeal to the Board, forward a case file within 10 business days of receipt of a notice of appeal, as dictated by the BLM Manual. See also Southern Utah Wilderness Alliance, 114 IBLA 326, 330 (1990). However, as Judge Child correctly noted, the Board's ruling in Utah Chapter is not applicable. Those cases addressed the time for submitting a case file to the Board, rather than to the Hearings Division or a State Director. Moreover, Judge Child correctly noted that, while binding on BLM, the 10-day rule does not have the force and effect of law and, therefore, is not binding on the Board. See Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986).

In the absence of a Departmental definition of the word "promptly," as that term is used in 43 CFR 4.470(d), we turn to the English dictionary. It is defined as "at once, immediately, quickly" (Webster's Third New International Dictionary 1816 (1971)). We also find the other requirements found at 43 CFR 4.470 to be enlightening. One of the primary thrusts of that regulation is to ensure expeditious review of final grazing decisions. Although the word "promptly" is not used in paragraph (a) of section 4.470, a permittee who fails to file a notice of appeal within 30 days is barred by paragraph (b) of the same regulation from challenging the decision. Further, the time for filing a motion to dismiss and the time for response to that motion are specifically limited. See 43 CFR 4.470(c). Considering the time in which an appellant must act, when it takes 3 or 7 months to perform the ministerial act of forwarding the appeal and case file supporting the decision appealed from to the State Director, the action can hardly be considered "prompt."

The Resource Area Offices stated that the issues to be addressed on appeal were difficult, the mails were slow, and there was other pressing business. We note, however, that nothing offered by the Resource Area Offices would be considered a basis for excusing a would-be appellant's failure to file an appeal from the same decision within the allotted 30 days. 3/ This being the case, we are hard pressed to find the stated reasons for the area offices' failure to forward the appeals within 30 days to be meritorious.

In this light, a reasonable assumption would be that, barring unusual circumstances preventing such action, it would be reasonable to expect that it would not take more than 30 days to forward an appeal to the State Director. However, the regulations do not set out a specific time for forwarding the appeal, and a failure to promptly do so will not, in and of itself, justify taking action such as that proposed by appellants. Nor do the regulations provide a mandatory sanction for failure to promptly forward an appeal to the State Director. Compare with 43 CFR 4.402 and 4.411(c).

The absence of language either mandating delivery of an appeal within a time certain or mandating a specific sanction for failure to promptly forward an appeal does not preclude an Administrative Law Judge or this Board from exercising the implicit authority to craft an appropriate

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3/ The Battle Mountain District Office stated that one of the reasons for accepting a 7-month delay was that "many of the thirty-two (32) points of appeal were complex and required lengthy research to insure that they were properly addressed" (Apr. 19, 1991, Memorandum to the State Director, Nevada). Compare this to the requirement in 43 CFR 4.470 that the appeal, which must be filed within 30 days, "shall state the reasons, clearly and concisely, why the appellant thinks that the decision of the authorized officer is in error. All grounds of error not stated shall be considered as waived, * * * ." Nothing in the regulations requires preparation of a response to the appeal before the Resource Area Manager forwards the appeal to the State Director.

sanction for a failure to abide by the letter or spirit of the procedural regulation, especially when there is a showing that the delay has prejudiced an appellant. The wording of 43 CFR 4.470 affords sufficient latitude to permit a discretionary sanction for an inordinate delay in forwarding an appeal, if an appellant can demonstrate prejudice to justify the imposition of a sanction. Cf. James C. Mackey, 114 IBLA 308, 312-13 (1990) (late filing of a statement of reasons); California Portland Cement Co., 40 IBLA 339, 342-43 (1979), rev'd on other grounds, Rosebud Coal Sales Co. v. Andrus, No. C79-160 B (D. Wyo. June 10, 1980), aff'd, 667 F.2d. 949 (10th Cir. 1982) (late filing of answer). Thus, if we are to impose any sanction for BLM's failure to forward the appeals to the State Director for 3 to 7 months there must be some demonstration of prejudice.

Appellants have argued that they have suffered prejudice as a result of BLM's long delay in forwarding their appeals to the State Director, and ultimately to the Hearings Division. They state only that it has either "impaired" (SOR, IBLA 91-277, at 5) or "significantly clouded" (SOR, IBLA 91-335 and 91-337, at 4) their livestock business. No supporting evidence is offered.

We look first to the June 1, 1990, decisions by the Tonopah Resource Area Manager (IBLA 91-335 and 91-337). In those decisions, the Area Manager reduced RO Livestock's authorized livestock grazing use on the order of either 974 AUM's (animal unit months), to be phased in over a 5-year period commencing July 1, 1990, or 1,182 AUM's, effective July 1, 1990. These decisions were not placed in full force and effect pursuant to
43 CFR 4160.3(c). Thus, the appeals stayed the effect of the decisions. See 43 CFR 4.21(a), 4.477(a), and 4160.3(c). In these circumstances, we find no basis for a conclusion that RO Livestock was harmed by BLM's failure to promptly transmit RO Livestock's appeals from the June 1, 1990, BLM decisions. No reduction of authorized grazing use is authorized during the pendency of RO Livestock's appeals. We concur with Judge Child's denial of RO Livestock's motions.

The Schell Resource Area Manager's July 16, 1990, decision to reduce Robison's authorized livestock grazing use commencing November 1, 1990, was placed in full force and effect pursuant to 43 CFR 4160.3(c). Thus, the first phase of the reduction took place before the Resource Area Office had forwarded the appeal to the State Director. It can thus be reasonably argued that Robison may have been prejudiced by the Resource Area Manager's failure to promptly forward the appeal to the State Director, leading to the ultimate delay in getting the appeal to the Hearings Division. However, considering the circumstances of this case, the action sought by Robison is not appropriate. Robison failed to make any assertion of injury until after the appeal had been lodged with the Hearings Division, at which time the wrong complained of had been cured. Indeed, there is absolutely nothing in the record to indicate that Robison made any inquiry about the status of his case prior to filing the motion to set aside the Resource Area Manager's decision. The motion was filed well after the first reduction had taken effect and after the case had been received by the Hearings Division in Salt Lake City. Robison did not petition for relief from the full force and effect portion of the Resource Area Manager's July 1990 decision, when the

file was finally received by the Hearings Division and did not do so when appealing to this Board. See 43 CFR 4.477(b). Robison's argument that he was injured by the Resource Area Manager's failure to promptly forward the appeal is vitiated by his failure to promptly seek relief. 4/ Having no evidence that Robison made any effort to ensure that his appeal had been forwarded to the State Director or made any inquiry as to its status until after his appeal had been received by the Hearings Division, we find no basis for error in Judge Child's refusal to exercise his discretionary authority to impose sanctions for the failure to promptly forward the appeal to the State Director, and find no compelling reason for our doing so.

Appellants will be fully afforded procedural due process. Upon return of the case files to the Hearings Division, the cases may proceed with a hearing and decision by Judge Child. See, e.g., BLM v. Babcock, 32 IBLA 174, 188, 84 I.D. 475, 482 (1977). Moreover, all parties will have a right to appeal any adverse decision to the Board, which will further ensure protection of their due process rights. See, e.g., Davis Exploration, 112 IBLA 254, 260 (1989).

Therefore, we conclude that Judge Child properly denied appellants' motions to set aside the Resource Area Managers' June and July 1990 decisions. See also Colorado Preferred Investment, Ltd., 16 IBLA 262 (1974) (appeal from Jan. 15, 1974, decision mistakenly transmitted to the Board and received on April 8, 1974, remanded to BLM for transmittal to Hearings Division).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the orders from which appellants have taken their interlocutory appeals are affirmed.

R. W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

4/ Robison could have sought relief in the Federal District Court even though an appeal was pending in the Hearings Division. When a BLM decision is given full force and effect during the course of an administrative appeal, a party suffering an ongoing injury need not exhaust administrative remedies before seeking judicial relief. See 5 U.S.C. § 704 (1988); In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51, 55 n.3 (1990); The Wilderness Society, 110 IBLA 67, 71-72 (1989).